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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

13 Cr. 811 (ALC)

5 ANDY MACCOW,

6 Defendant.

7 -----x

8 July 17, 2015

9 10:45 a.m.

10 Before:

11 HON. ANDREW L. CARTER, JR.,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
17 Southern District of New York

BY: JASON A. MASIMORE

18 Assistant United States Attorney

19 DOAR, RIECK, KALEY & MACK

20 Attorneys for Defendant

BY: WALTER S. MACK, JR.

21  
22 ALSO PRESENT:

23 SPECIAL AGENT THOMAS D'AMICO, FBI

24 ELIZA LEHNER, Intern, U.S. Attorney's Office

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(Case called)

MR. MASIMORE: Good morning, your Honor. Jason Masimore for the government. With me at counsel's table is, with the court's permission, Eliza Lehner, an intern with our office, and Special Agent Thomas D'Amico of the F.B.I.

THE COURT: And for the defendant?

MR. MACK: Good morning, your Honor. I am Walter Mack for the defendant. Mr. Maccow is sitting to my left in court today.

THE COURT: So we are here today to perhaps have a hearing on issues related to obstruction of justice and acceptance of responsibility and the like. I have seen the parties' most recent submissions. Let me just get some clarification as to what the parties' positions are currently. I believe I understand what they are. I just want to confirm it for the record. So let me hear from defense counsel as to what your position is regarding what the guidelines should be and what your position is regarding the propriety of this hearing and what needs to be elicited at this hearing.

MR. MACK: Yes, your Honor.

I am actually speaking, hopefully, consistently with my letter of yesterday that I sent to the court when I say the following:

Despite what I have said in the past and upon further effort and what have you, the issue that, at least as to the

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1 guidelines that I am asking the court to resolve, is that  
2 Mr. Maccow should receive from the probation department's  
3 computation in the PSR acceptance of responsibility and  
4 timeliness credits, three levels.

5 The probation department has taken the view and  
6 presented to your Honor a recommendation of a 121-month  
7 sentence, which is consistent with level 30, which is what  
8 their position was. They have not granted any acceptance of  
9 responsibility or timeliness credit.

10 What I would want to urge upon your Honor is that this  
11 is covered by what was quoted both by the government and I that  
12 this is an extraordinary case, given my understanding of the  
13 law, that would justify the court's resolution that three  
14 levels can be subtracted from 30, making it a level 27  
15 guidelines situation, rather than level 30, which is what the  
16 probation department is stating. That difference is 121 to 151  
17 months at level 30 and 121 months is the sentencing  
18 recommendation. What we are asking is that in fact there be a  
19 resolution that he is entitled, given the facts, to an  
20 acceptance of responsibility and timeliness determination and  
21 that the proper level should be level 27, which is 87 to 108  
22 months for the guidelines suggested or advisory level.

23 What we are prepared to say and, if necessary, call  
24 Mr. Maccow on, points to deal with the court's concern  
25 expressed last we met I think in April of this year. My

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1 argument is that in fact this is a case in which that credit  
2 should be given based upon the facts.

3 THE COURT: Okay. Let me hear from the government  
4 regarding your position currently.

5 MR. MASIMORE: Yes, your Honor. Currently the  
6 government believes that the probation office offered a legally  
7 correct calculation of the guidelines in connection with the  
8 sentencing insofar as the PSR included an adjustment for  
9 obstruction of justice because of his conviction for the  
10 obstruction of justice offense.

11 The way the plea agreement was structured, we didn't  
12 include that. It was an error. The plea agreement also, at  
13 the time the plea agreement was entered into, gave Mr. Maccow  
14 credit for acceptance of responsibility. Our understanding of  
15 the law is the court is not required to withhold acceptance of  
16 responsibility if there is an enhancement for obstruction of  
17 justice. Our position when we entered the plea agreement and I  
18 think as we stand here now, before Mr. Maccow would take the  
19 stand, is that the court would be within its discretion to  
20 apply the acceptance of responsibility based on some of the  
21 factors, including the timeliness of the defendant's acceptance  
22 of responsibility and how, on the night of his arrest, he gave  
23 a fairly full and comprehensive confession not only to his  
24 conduct in the burglary and conspiracy to distribute drugs  
25 offenses, but also with respect to the obstruction of justice

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1 offense.

2 As I noted in our letter, the court had asked some  
3 questions about the outburst at one of the status conferences.  
4 When we entered into the plea agreement, this was post that  
5 outburst. The feeling on our side was that there were  
6 significant mitigating circumstances, namely, that a large  
7 portion of the confession that Mr. Maccow had given had related  
8 to some very serious crimes committed by some of the people  
9 sitting right next to him when he made that outburst and, in  
10 fact, by some of the people who may have been present as  
11 audience members in the courtroom. We understood that at the  
12 time, and so we were still willing to -- and of course it is  
13 not binding on the court, but for purposes of the plea  
14 agreement, we were willing to still give him acceptance of  
15 responsibility points and not view that as an intentional  
16 outburst for the purpose of obstructing justice as much as it  
17 was responding to some external stimuli that were present.

18 Our position, though, is that if Mr. Maccow persists  
19 in the argument or persists in bringing facts forward in  
20 support of a reduced sentence that aren't consistent with what  
21 we understand to be the truth from his prior admissions, namely  
22 one, if he were to take the stand and give an account as it is  
23 described in the sentencing submission under oath where this  
24 was a chance encounter and, two, if Mr. Maccow were to repeat  
25 on the stand under oath some of the facts that he had stated in

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1 his outburst, specifically, that he wasn't in his right frame  
2 of mind during his postarrest and that he was tricked by the  
3 agents into signing the advice of rights, and that he was so  
4 under the influence of drugs that he just didn't know what he  
5 was doing, if he were to do that now, I think we would have no  
6 choice but to view that as further obstructive conduct, and I  
7 think we would have to argue that he has not accepted  
8 responsibility and we would argue for greater sentence.

9 As it stands now, even though we made the error in the  
10 plea agreement, the government is standing by the guidelines  
11 range of 92 to 115 months as an appropriate sentence, if  
12 nothing more happens, based on the totality of circumstances.

13 THE COURT: So just to be clear, let me make sure I  
14 understand the government's position. Is the government's  
15 position that you agree legally that Mr. Maccow at this point  
16 would be entitled to acceptance of responsibility under the  
17 guidelines and that would reduce his range from the adjusted  
18 offense level from 30 to 27 and then in category III, his  
19 guideline range would be 87 to 108 months? I understand the  
20 plea agreement had different estimates, but is the government's  
21 position -- I know you indicated that you feel that acceptance  
22 of responsibility obviously is something that's in my  
23 discretion, but is it your position that, based on the facts as  
24 we have them now, prior to having any hearing, that acceptance  
25 of responsibility is appropriate notwithstanding the

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1 obstruction of justice enhancement?

2 MR. MASIMORE: That is the current position, yes, your  
3 Honor.

4 THE COURT: I think it is helpful to have everyone's  
5 position clear.

6 Let me just explain something else to the parties in  
7 terms of what my thinking is at this point. I have looked at  
8 the case that the defense cited regarding acceptance of  
9 responsibility notwithstanding obstruction of justice  
10 enhancement. I don't think that case is particularly helpful.  
11 That case certainly focuses on timeliness. There are other  
12 cases, in particular there is a case, *United States of America*  
13 *v. Derek Jones*, 1995 U.S. Dist. Lexis 19878. It was Crim.  
14 number 295 Cr. 22-02 from 1995, which focused on, in addition  
15 to timeliness, the timing of the acceptance of responsibility  
16 vis-a-vis the obstruction of justice. And many other cases  
17 talk about when the obstruction of justice happens in the early  
18 stages of the proceeding and especially when the obstruction of  
19 justice happens prior to arraignment, that courts are certainly  
20 working within their discretion, then, to still award  
21 acceptance of responsibility points for action that happens  
22 later.

23 So, for example, in that case after the obstructive  
24 conduct took place in the *Derek Jones* case, the defendant in  
25 that case was arrested, spoke truthfully to agents, and pled

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1 guilty and accepted responsibility for the actions, and the  
2 court awarded acceptance of responsibility points even though  
3 an obstruction of justice enhancement was given.

4           It seems to me that, as we sit here now, this case may  
5 be very similar to Derek Jones, in terms of what I have before  
6 me now is no doubt obstruction of justice regarding what  
7 Mr. Maccow did to that witness who he believed was cooperating  
8 against him, but that happened certainly prior to the  
9 arraignment in this case. That happened prior to the  
10 arraignment and prior to his arrest. Once he was arrested, the  
11 information that I have before me is that Mr. Maccow made  
12 certain statements and the government is taking the position  
13 that those statements Mr. Maccow made at the time that he was  
14 arrested were true. The government also takes the position  
15 that the statements Mr. Maccow made to the probation  
16 department, as they were investigating this case, which  
17 certainly happened following the arraignment and later on and  
18 far on into this litigation process, were also true.

19           My concerns before focused on some of the arguments  
20 that were being made by defense counsel that seemed to indicate  
21 at first some concerns as to whether or not the obstruction of  
22 justice enhancement should apply. I think those have been  
23 resolved. Now I have a clear understanding of the defense's  
24 position. But my understanding is that the defense was at some  
25 point taking a position that some of the statements that



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1 Mr. Maccow allegedly made to the agents were incorrect and that  
2 the statements that Mr. Maccow made to probation or certain  
3 portions of that were also incorrect, and that while Mr. Maccow  
4 still obstructed justice, he wants me to be aware that he  
5 obstructed justice in a different way than as set forth in the  
6 probation department report and in a different way than what  
7 was set forth when he spoke to the agents upon his arrest.

8 It does seem to me at this point, before we go further  
9 and have a hearing, I certainly would be acting within my  
10 discretion -- and I might very well be inclined -- to give him  
11 acceptance of responsibility points, the three points for  
12 acceptance of responsibility based on what I have before me  
13 now.

14 Obviously, if we wish to have a hearing, we may do so,  
15 and I think the defense had at one point indicated they had a  
16 desire to at least flesh out this slightly different version of  
17 events. So I just want the parties to understand that. If  
18 Mr. Maccow puts forth any testimony that is inconsistent with  
19 what was previously said, that doesn't mean that what he is  
20 saying now isn't true, but I would certainly need to make some  
21 factual findings regarding what the truth might be if we have  
22 some sort of hearing. I am going to need to make some sort of  
23 factual findings as to what the facts are and if, at this  
24 stage, toward the end of the litigation process, he starts to  
25 lie or frivolously contest certain things, then it seems that I

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1 would be kind of hard pressed at that point to give him  
2 acceptance of responsibility. So I just wanted to let the  
3 parties know that and find out if the parties wish to have --  
4 perhaps it may make sense to take a small break and let counsel  
5 talk about this and think about this and figure out if you  
6 actually wish to have this hearing. So maybe we should do  
7 that.

8 MR. MACK: Just a couple of comments, your Honor.

9 Number one, I apologize to the court. The *Jones* case  
10 is actually in the footnote of the sentencing guidelines manual  
11 that we also cited, so that case is in there, so I apologize if  
12 the court believes I was denying important authority.

13 The other concern I just wanted to address at one time  
14 back when at an earlier conference the court expressed some  
15 concern about I think the April 4, 2014, discussion by  
16 Mr. Maccow before your Honor, I know the court has the power to  
17 decide that itself was obstructive conduct and all I wanted to  
18 ask if that was something that figured in your remarks or is  
19 that something that I should address, because I think you  
20 instructed me be prepared today to address that outburst. But,  
21 given the government's position, I would like to avoid doing  
22 that, unless the court feels it is necessary. I just don't  
23 want to forget about it because I know the court directed me to  
24 be prepared to respond to that.

25 THE COURT: Given what I have received from the

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1 government, the submission of the government and the broader  
2 context of my understanding of what might have been happening  
3 there, I am not inclined to give an additional enhancement for  
4 obstruction of justice based on what was said there. Again, to  
5 be clear, some of my concerns before were based on inferences  
6 that defense counsel wished for me to draw about what might  
7 have actually happened in terms of the obstructive conduct and,  
8 again, my understanding is the main difference that the defense  
9 wanted me to focus on was whether or not Mr. Maccow planned to  
10 confront this alleged cooperator or whether it was just a spur  
11 of the moment meeting. But I think even with what defense  
12 counsel was stating before, there would be no doubt that an  
13 obstruction of justice enhancement would be justified. And, as  
14 I mentioned then, I believe, I'm not sure that that makes a  
15 difference; and, if it does make a difference, I'm not sure it  
16 is actually better for Mr. Maccow if in fact it is that he just  
17 lacks that sort of impulse control and sees someone who he  
18 believes is cooperating against him and reacts violently that  
19 quickly.

20 But, all that being said, at this point, no, I am not  
21 inclined to give him an additional obstruction of justice  
22 enhancement. I am inclined to give him acceptance of  
23 responsibility under the guidelines based on the information  
24 that I have before me now. Obviously we are here. We have  
25 time for a hearing. If the parties wish to have a hearing to

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1 bring out these facts any more, we can do that. But obviously  
2 I want Mr. Maccow to understand that if in doing this and  
3 counsel understand that if in doing this I determine -- I am  
4 not going to prejudge this -- that you are frivolously  
5 contesting this or you are putting forth some sort of false  
6 information and doing other things that sort of militate  
7 against a finding that there is timely acceptance of  
8 responsibility, then I very well may not give him acceptance of  
9 responsibility.

10 MR. MACK: Understood, your Honor. I wonder if I  
11 could have maybe three minutes to talk to Jason Masimore and  
12 talk to my client.

13 THE COURT: Certainly I will give you five.

14 MR. MACK: I think I know pretty clearly what my  
15 recommendation would be.

16 THE COURT: Okay. Thank you.

17 (Recess)

18 THE COURT: How do the parties wish to proceed? Are  
19 we going to proceed with a hearing today.

20 MR. MACK: Not from the defense point of view, your  
21 Honor, given what has happened. I believe the government  
22 agrees that it is unnecessary and the sentencing should  
23 proceed, but I will let Mr. Masimore speak his own. But from  
24 the defense point of view, we do not feel a hearing need be  
25 done today.

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1 THE COURT: Okay. From the government's perspective.

2 MR. MASIMORE: I agree, your Honor. As I understand  
3 it, the defense is no longer going to put forth the argument  
4 that it was a chance encounter that led to the obstruction of  
5 justice, and so that fact not coming before the court anymore,  
6 nothing else material would be in dispute. So as long as  
7 that's what their arguments here are, then we don't think there  
8 is a reason for a factual hearing.

9 THE COURT: Is that correct, counsel?

10 MR. MACK: We are not going to make the argument, your  
11 Honor. But I am not conceding that I falsely provided  
12 information to the court, but we are not making the argument.

13 THE COURT: Okay. Let's do this. I know that  
14 Mr. Maccow has been waiting anxiously for sentence. I am not  
15 prepared to go forward with the sentence today. I was prepared  
16 for this hearing. I need some time to think again about the  
17 sentence, so let's just adjourn this for another date. Can we  
18 get a date sometime perhaps in September, Tara?

19 THE DEPUTY CLERK: Friday, September 10, at 3:00.

20 THE COURT: Does that date and time work for everyone?

21 MR. MASIMORE: Yes, your Honor. Thank you.

22 THE COURT: Does that work for the defense as well?

23 MR. MACK: I believe it does, your Honor. If I can  
24 just have a minute here with my calendar.

25 (Pause)

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1 MR. MACK: September 10 at 3:00?

2 THE COURT: Yes.

3 MR. MACK: That works. I just would like to say  
4 obviously Mr. Maccow is very anxious and was anxious today, so  
5 fine, but we will do whatever we need to do to help the court  
6 in terms of getting sentenced that day because I know how out  
7 of bounds Mr. Maccow is about the uncertainty of his future.

8 THE COURT: Let's do this, though, while we are here.  
9 Are there any other objections to the guideline calculation?  
10 So, just to be clear, for the record, I find that Mr. Maccow is  
11 in criminal history category III with the total offense level  
12 of 27, giving him the three points for acceptance of  
13 responsibility which has a guidelines range of 87 to 108  
14 months. That is the court's guideline determination.

15 Are there any objections to anything else in the  
16 guideline calculation? I understand the parties may make other  
17 arguments in terms of what the appropriate sentence may be, but  
18 as an initial matter, I have to determine the guideline range  
19 that applies prior to any downward or upward departures or  
20 variances from the guideline. Are there any other objections  
21 to the guideline range that's been determined by the court by  
22 the government?

23 MR. MASIMORE: No, your Honor.

24 THE COURT: By the defense?

25 MR. MACK: No, your Honor.

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1 THE COURT: Okay. So we will see you on September 10.

2 Thank you.

3 MR. MASIMORE: Thanks, Judge.

4 MR. MACK: Thank you.

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